NO. A10-1607

State of Minnesota
In Court of Appeals

Brickwell Community Bank,

Appellant,

vs.

Hunter Construction, Inc., and
Verde General Contractor, Incorporated,

Respondents,

Kevin Lam, Lee-Tzong Chen, Ming-Mei Chen, Karl L. Kruse, Starbound St. Paul Hotel, LLC, a Minnesota limited liability company, Wing-Heng, Inc., a Minnesota corporation, Brickwell Community Bank, a Minnesota corporation, Integrity Works Construction, Inc., a Wisconsin Corporation, City of Saint Paul, John Doe, Mary Roe, ABC Corporation and XYZ Partnership,

Defendants,

JZ Electric, Inc., a Minnesota Corporation, Hamline Construction, Inc., a Minnesota Corporation, Hunter Construction, Inc., a Minnesota Corporation, Verde General Contractor Incorporated, a Minnesota Corporation, Midwest Building Maintenance, L.L.C., a Minnesota limited liability company, Winrock Corporation, a Nevada Corporation, Sheik A.N. Azizudin, All Floors Plus, Inc., a Minnesota Corporation,

Additional Defendants.

APPELLANT BRICKWELL COMMUNITY BANK'S BRIEF AND ADDENDUM

(All Counsel identified on following page)

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MINNESOTA CASES

RULES

SECONDARY AUTHORITIES

STATUTES

STATEMENT OF LEGAL ISSUES

I. Did the district court err in its interpretation and application of Minn. Stat. § 514.08, when it ruled that a mechanic's lien claimant's delivery of a mechanic's lien statement on the property owner constitutes personal service under Minn. Stat. § 514.08?

In its motion for a directed verdict (T. 505; App. 59) and its post-trial motions (App. 69, 123), Brickwell Community Bank argued that neither Minn. Stat. § 514.08 nor Rule 4.02 of the Minnesota Rules of Civil Procedure permit a mechanic's lien claimant to administer personal service of the mechanic's lien statement on the property owner pursuant to Minn. Stat. § 514.08. The district court rejected the arguments of Brickwell and ruled that the lien claimants had properly served their respective mechanic's lien statements personally on the property owner within the meaning of Minn. Stat. § 514.08.

Apposite Authority:
Minn. Stat. § 514.08
Minn. Stat. § 514.11
Minn. R. Civ. P. 4.02
Ryan Contracting, Inc. v. JAG Investments, 634 N.W.2d 176 (Minn. 2001).

STATEMENT OF THE CASE

This mechanic's lien action arises out of the renovation of a La Quinta Inns & Suites ("Hotel") in St. Paul, Minnesota. Eclipse Architectural Group, Inc. brought an action in Ramsey County District Court seeking to foreclose the mechanic's lien that it had filed against the subject property, which is legally described as: Lots 1, Block 1, Chen's Addition, Ramsey County, Minnesota ("Property"). (App. 1) Along with their answers, defendants Hunter Construction, Inc. ("Hunter Construction"), Midwest Building Maintenance, L.L.C's ("Midwest"), and Verde General Contractor Incorporated ("Verde"), brought crossclaims seeking to foreclose their respective mechanic's liens against the Property. (App. 27-47) Appellant Brickwell Community Bank ("Brickwell"), which financed the hotel renovation and recorded two mortgages against the Property to secure its loan, challenged the validity of defendants' mechanic's liens, arguing, in part, that the mechanic's lien statements had not been properly served under Minn. Stat. § 514.08 (2008). (App. 48)

The matter came on for a four-day court trial beginning on September 14, 2009. The parties agreed that the issues for trial were limited to the validity and amounts of defendants' mechanic's liens. (Add. 8) During trial, Kevin Hunter, who is the owner of Hunter Construction and Midwest, testified that he did not serve the property owner with copies of defendants' mechanic's lien statements by certified mail as defendants had represented in their respective crossclaims. (T. 322) He testified that he simply handed the property owner with copies of the lien statements. (T. 146-147) The property owner disputed this claim and denied that Hunter ever handed him copies of the lien

statements. (T. 557; 655) Based on Hunter's testimony, Brickwell moved for a directed verdict seeking to dismiss defendants' mechanic's liens, arguing that defendants had not properly personally served the owner of the Property with their mechanic's lien statements within the meaning of Minn. Stat. § 514.08. (Add. 11; T. 505) [1] The district court denied the motion. (Add. 11; T. 536)

On April 22, 2010, the district court issued its Findings of Fact, Conclusions of Law, and Order for Judgment. (Add. 7) The court awarded Hunter Construction and Verde mechanic's liens in the principal amounts of $86,808.55 and $72,500, respectively. (Add. 18-19) The court ruled that Midwest was not entitled its mechanic's lien because it had failed to prove it made contributions to the Property for which it had not been paid. (Add. 19)[2]

In reaching its decision, the district court concluded that respondents had accomplished personal service within the meaning of Minn. Stat. § 514.08, when Hunter simply handed copies of the mechanic's lien statements to the property owner. (Add. 18) The court ruled that Minn. Stat. § 514.08 and Rule 4.02 of the Minnesota Rules of Civil Procedure, which governs who may administer personal service, were inconsistent with each other because a mechanic's lien statement does not constitute a "summons" or "other process" within the meaning of Rule 4.02. (*Id.*) The court

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[1] "T." refers to the transcript of the trial held on September 14 -17, 2009.

[2] For ease of reference, Hunter Construction and Verde shall be referred to collectively as "respondents," unless otherwise noted. Midwest has not appealed the district court's decision that it was not entitled to its mechanic's lien, and for this reason is not considered a respondent in this appeal.

reasoned that personal service by a nonparty under Rule 4.02 was not required because service of a mechanic's lien statement does not commence an action or confer jurisdiction on the court. (*Id.*) The court ruled that a lien claimant fulfills the requirements of Minn. Stat. § 514.08 by simply delivering a copy of the mechanic's lien statement to the property owner. (*Id.*) The court also concluded that even if Rule 4.02 applied, and personal service by a nonparty was required, respondents accomplished personal service within the meaning of Minn. Stat. § 514.08 because Hunter, as a natural person, was legally distinct from respondent corporations, and therefore, not a party to the mechanic's lien actions. (*Id.*)

On May 20, 2010, Brickwell served and filed a motion for amended findings of fact, conclusions of law and order for judgment, or in the alternative, a new trial. (App. 123) It argued, in part, that the district court erred in concluding that the lien claimants had properly personally served their mechanic's lien statements within the meaning of Minn. Stat. § 514.08. (*Id.*) By Order dated July 9, 2010, the district court denied Brickwell's post-trial motions. (Add. 1) The district court entered judgment on August 2, 2010. (Add. 3) This appeals follows.

STATEMENT OF FACTS

Kevin Lam was the owner of Wing-Heng, Inc. ("Wing-Heng"), which owned a seven-story hotel it operated as a La Quinta Inns & Suites Hotel. In 2007, Wing-Heng undertook renovations to the hotel that involved the remodeling of the kitchen, dining room, and bar, and the construction of a swimming pool. (Add. 9) Following the replacement of the initial and two subsequent general contractors, Wing-Heng retained respondent Hunter Construction to serve as the general contractor for the project and to complete the renovations. (Add. 10; T. 541-542) Wing-Heng employed Najib Mailatyar as its on-site project manager for the renovation project. (Add. 10; T. 629-630)

In order to finance the renovation, Wing-Heng obtained a loan from Brickwell that was secured by two mortgages. (Add. 9) Brickwell recorded the first mortgage, which was in the amount of $4,573,000, as Ramsey County Document No. 2009060, on June 25, 2007. (*Id.*) On the same day, Brickwell recorded the second mortgage in the amount of $947,000, as Ramsey County Document No. 2009062. (*Id.*)

The renovation project was never completed, despite Hunter Construction receiving $418,204.74 from Brickwell. (Add. 10, 12).

Alleging that it was still owed for its work on the project, on February 21, 2008, Hunter Construction filed a mechanic's lien statement in the Office of the Ramsey County Registrar of Titles as Document No. 2031499, in the amount of $124,458.57. (App. 10) Mailagyar testified that he has no idea how Ken Hunter came up with the

amount allegedly owed to Hunter Construction, that Hunter Construction has been overpaid, and that the work was never completed. (T. 648 – 649)

At the same time the Hunter Construction mechanic's lien was filed, Midwest filed a mechanic's lien statement in the Office of the Ramsey County Registrar of Titles, as Document No. 2031501, in the amount of $100,000. (Add. 10) Hunter testified that Midwest, one of his other companies, had performed building maintenance, cleaning, painting, and construction clean-up on the project. (T. 106). Lam and Mailagyar, however, both testified they never heard of Midwest. (T. 557; 637). Hunter testified that the Midwest mechanic's lien consisted of $100,000.00 for his own personal labor on the project as an employee of Midwest (T. 313). He testified that this $100,000 of labor was in addition to Hunter Construction mechanic's lien amount, which also included Hunter's own personal labor. (T. 313). The documentation supporting Midwest mechanic's lien consisted of a 2-page invoice that contained no work dates. (Tr. Ex. 301). During trial, Hunter acknowledged that he created the document only after Midwest filed its mechanic's lien against the Property. (T. 309-310). He does not recall when he drafted it. (T. 309-310).

Respondent Verde served as a subcontractor to Hunter Construction on the project. On February 21, 2008, it also filed a mechanic's lien statement in the Office of the Ramsey County Registrar of Titles, as Document No. 2031500, in the amount of $80,500.00 ("Verde's Mechanic's Lien"). (App. 10)

In their cross-claims, Hunter Construction and Verde both alleged they served their mechanic's lien statements "[o]n or about February 21" by certified mail. (App.

29, 43). During trial, however, Hunter testified that the mechanic's lien statements were not served by certified mail, but rather, he personally delivered all three of the mechanic's lien statements to Lam. (T. 146-149).

Initially, Hunter testified that he delivered the lien statements "immediately" and "right after" getting the lien statements recorded on February 21, 2008. (T. 146-147). Later, when asked if he delivered them on February 22, 2008, Ken Hunter stated: "Possibly, because I think - - you know, between the two times that we served them - - I can't even remember exactly which one was which." (T. 318). But both Lam, who no longer owned the hotel and had filed for bankruptcy, and Mailatyar testified that Hunter never delivered the mechanic's lien statements to them. (T. 543-544; 557; 655).

On the eve of the first day of trial, Hunter and Jose Verdeja, the owner of Verde, visited both Lam and Mailatyar, asking them to testify that Hunter had delivered the mechanic's lien statements to them. (T. 319-320; 550-556; 660-661) Lam testified that he was "so shocked" when Ken Hunter and Jose Verdeja showed up at his place of work place, and described the encounter as follows:

> A: Okay. I tell you what, in this case, happened, Ken Hunter, two or three weeks ago, came to my restaurant, what I told you. He asking me, saying that if I come to testify, say I got the lien, he can convince his mom to give me the loan ... But Ken tell me, come here, say I come to the court to testify that I received the lien, he would convince his mom to extend the loan * * *

(T. T. 555-575)

Mailatyar also testified that Hunter showed up at his house and asked him to testify that the mechanic's lien statements were delivered to him, and said not to worry

because "this is not going to come out of your or Kevin's pocket, this is the bank." (T. 662) During this visit by Hunter, Mailatyar told Ken Hunter that his attorney should handle this situation, to which Hunter replied, "my attorney think that they are not having a good case, you know, proof of serving the lien." (T. 662)

At trial, Hunter testified that during a bankruptcy meeting of creditors, Lam stated that he received the mechanic's lien statements from Hunter. (T.180-181) Lam denied making this statement. (T. 181; 558-560) There is no documentation or third-party testimony evidencing Hunter's delivery of the mechanic's lien statements.

In its Findings of Fact, the district court acknowledged the disputed testimony, but found that Hunter did personally serve Lam and Mailatyar with the February 21 2008 mechanic's lien statements of Hunter Construction, Midwest, and Verde. (Add. 11) It also found that Brickwell did not suffer any prejudice from any "technical deficiency" relating to the service of the mechanic's lien statements. (*Id.*)

ARGUMENT

I. STANDARD OF REVIEW

"The standard of review of a bench trial is broader than the standard for jury verdicts." *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 48 (Minn. 1989). A reviewing court must determine whether the district court's findings are clearly erroneous and it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). "Findings of fact are considered clearly erroneous only if they are not reasonably supported by the evidence." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). On appeal, a reviewing court may set aside "findings of fact that are influenced by error of law." *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 406 (Minn. App. 1991). An appellate court also is not bound by the district court's decision on a purely legal issue. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). The construction of Minnesota's mechanic's lien statute is a question of law that this court reviews de novo. *David-Thomas Co., Inc. v. Voss*, 517 N.W.2d 341, 342 (Minn. App. 1994).

II. THE DISTRICT COURT ERRED IN ERRED IN ITS INTERPRETATION AND APPLICATION OF THE PERSONAL SERVICE REQUIREMENT UNDER MINN. STAT. § 514.08.

As a prerequisite to foreclosing on a mechanic's lien in Minnesota, the lien claimant must perfect the lien, in part, by serving the property owner with a copy of its mechanic's lien statement pursuant to Minn. Stat. § 514.08, subd. 2 (2008). The district court erred in ruling that respondents accomplished personal service when Hunter Construction's owner, a party to the mechanic's lien action, simply handed a copy of the

mechanic's lien statements to the property owner. Because respondents did not properly serve the property owner with copies of their mechanic's lien statements within 120 days of their last contribution to the improvements on the Property, their liens ceased to exist and the district court had no jurisdiction over their lien claims.

A. MINNESOTA'S MECHANIC'S LIEN STATUTE DISTINGUISHES BETWEEN PERSONAL SERVICE AND DELIVERY.

Before a mechanic's lien claimant may commence an action to foreclose its mechanic's lien, it must perfect its lien pursuant to Minn. Stat. § 514.08. This section provides, in part, that "[t]he lien ceases at the end of 120 days after doing the last of the work, or furnishing the last item of skill, material, or machinery, unless within this period * * * a copy of the lien statement is ***served personally*** or by certified mail on the owner of the property, or the owner's authorized agent." Minn. Stat. § 514.08, subd. 1 (2) (2008) (emphasis added). Once the 120-day period expires, the mechanic's lien ceases to exist and becomes null and void. *See Pella Prod., Inc. v. Arvig Tele. Co.,* 488 N.W.2d 316, 317-319 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). "After the lien has ceased to exist, courts have no power to revive or create one." *H.S. Johnson Co. v. Ludwigson*, 148 Minn. 468, 470, 182 N.W. 619, 619 (1921).

The mechanic's lien statute does not specifically define the phrase "served personally," nor does it explicitly address who may administer personal service of the mechanic's lien statement on the property owner pursuant to Minn. Stat. § 514.08. But by requiring the lien claimant to have its mechanic's lien statement "served personally" on the property owner, the legislature contemplated and required something more than

simple "delivery" of the lien statement. Throughout the mechanic's lien statute, the legislature distinguishes between situations where formal "service" is required, and those where simple "delivery" is sufficient. The district court's decision eviscerates this distinction and renders the legislature's use of the term "service" insignificant, if not superfluous.

The goal of statutory interpretation is to "ascertain and effectuate" the legislature's intent. Minn. Stat. § 645.16 (2008). When interpreting a statute, courts must first determine whether the statutory language, on its face, is clear or ambiguous. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). A statute is ambiguous when its language is subject to more than one reasonable interpretation. *Id.* Whenever possible, courts must interpret a statute to give effect to all of its provisions and "no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Id.* In doing so, courts "are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." *Id.* It is for this reason that when the same word or phrase is used in the same section of an act more than once, and the meaning is clear in one place, a court will construe it to have the same meaning in the next place. *See Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D.C. Minn. 1939).

In describing the manner in which a lien claimant must provide the property owner with copies of its mechanic's lien statement and the summons commencing the mechanic's lien foreclosure action, the mechanic's lien statute uses the terms "serve," "served," or "service." The statute requires the lien claimant to have the mechanic's lien

statement "***served personally***" on the property owner within 120 days of the last item of work, otherwise the lien ceases to exist. Minn. Stat. §514.08, subd. 1(2). In the mechanic's lien statement itself, the lien claimant must verify under oath that "a copy of the [mechanic's lien] statement has been ***served personally*** or by certified mail within the 120-day period provided in this section on the owner, the owner's authorized agent or the person who entered into the contract with the contractor as provided herein." Minn. Stat. § 514.08, subd. 2(8) (emphasis added).

Similarly, the mechanic's lien statute requires that the lien claimant must have the summons commencing the lien foreclosure action served on the property owner, stating: "[t]he action may be commenced by any lienholder who has filed his lien statement for record and ***served*** a copy thereof on the owner pursuant to section 514.08." Minn. Stat. § 514.11 (emphasis added). This section further requires that all other lienholders "shall be made defendants therein" and that the summons "shall require each defendant to file answer to the complaint with the court administrator within 20 days after ***service*** on the defendant." *Id.* (emphasis added).

In contrast, the mechanic's lien statute uses the words "delivered" or "delivery" to describe the manner by which a lien claimant must provide the property owner with prelien notice when such notice is required. The prelien notice statute provides, in part, that "[t]he notice shall be ***delivered personally*** or by certified mail to the owner or the owner's authorized agent within 10 days after the contract for the work of improvement is agreed upon." Minn. Stat. § 514.011, subd. 1 (emphasis added). Likewise, a subcontractor must provide prelien notice to the property or the owner's authorize agent

"either by ***personal delivery*** or certified mail, not later than 20 days after the lien claimant has first furnished labor, skill or materials to the improvement." Minn. Stat. § 514.011, subd. 2 (emphasis added).

The legislature's decision to distinguish between the type of notice that a lien claimant must provide a property owner is significant and not mere coincidence. The terms "service" or "served" are terms of art that have a widely accepted and distinct meaning under Minnesota law – the "actual, ***formal notice*** to the defendant of the action." *Ryan Contracting, Inc. v. JAG Investments*, 634 N.W.2d 176, 183 (Minn. 2001) (quoting *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 867 (Minn. 2000)).

The legislature's distinction between the terms "delivery" and "service" was purposeful and manifests an important distinction because the "legislature must be presumed to have understood the effect of its words." *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (citing *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958)). Their use reflects the legislature's intent to require lien claimants to follow the formal requirements of personal service in certain situations, i.e. notice of the mechanic's lien statement, and the use of less formal delivery in others, i.e. the providing of prelien notice when the lien claimant first furnishes improvements. As this court has recognized, the methods of service "are distinct, governed by distinct requirements, and these requirements are not interchangeable." *Lundgren v. Green*, 592 N.W.2d 888, 892 (Minn. App. 1999). The district court's decision erroneously treats service and delivery under the mechanic's lien statute as synonymous and interchangeable.

The distinction between "service" and "delivery" finds further support in the legislative history of the mechanic's lien statute. The canons of statutory construction provide that when the words of a statute are not explicit, a court may ascertain the intent of the legislature by considering, among other things, the contemporaneous legislative history of the statute. Minn. Stat. § 645.16 (2008). Because Minn. Stat. § 514.08 does not explicitly define the phrase "served personally" or who may administer personal service of the mechanic's lien statement, this court is free to consider the legislative history of the mechanic's lien statute to determine the meaning and legislative intent behind the personal service requirement of Minn. Stat. § 514.08.

In considering the contemporaneous history of a statute, courts "may consider the events leading up to legislation, the history of its passage, and any modifications made during its course." *Handle With Care, Inc. v. Dept. of Human Serv.*, 406 N.W.2d 518, 522 (Minn. 1987) (citation and quotation omitted). This includes legislative committee reports and journal entries, legislative meeting minutes, the notes of the legislation's drafters, and tape-recordings of legislative committee meetings. *Id.*; *see also Shields v. Goldetsky*, 552 N.W.2d 226, 231 (Minn. 1996) (holding resort may be had to notes of drafters of uniform state law to determine legislative intent where statutory language ambiguous); *First Nat'l Bank v. Gregg*, 556 N.W.2d 214, 217 (Minn. 1996) (holding courts may consider statements made in legislative committee to determine legislature's intent where statutory language is ambiguous).

In 1973, the legislature considered Chapter 247 – Senate File No. 6, which amended the notice requirements under Minn. Stat. § 514.08, and proposed the prelien

notice requirements now codified in Minn. Stat. § 514.011. The legislature described the purpose of Senate File No. 6 as an "an act relating to real estate; liens for improvements thereto; extent and amount thereof; ***requiring notice to owners***." (App. 146) (Emphasis added.)

In the original draft, the bill required the personal service of any prelien notice, stating that:

> the notices shall be prepared separately and ***served personally*** or by certified mail on the owner or his authorized agent within ten days after the contract for the work of improvement is agreed upon.
>
> * * * *
>
> either by ***personal service*** or certified mail, not later than 20 days after the lien claimant has first furnished labor, skill or materials to the improvement.
>
> (App. 147 (Emphasis added.)

The draft legislation also added subpart 2 to subdivision 1 of Minn. Stat. § 514.08. (App. 152) The original language is substantially the same as the current statutory language, and provided that a mechanic's lien "ceases to exist at the end of 90 days after the doing of the last of such work, or furnishing the last item of such skill, material, or machinery, unless within such period * * * (2) A copy of such statement be ***served personally*** or by certified mail on the owner or his authorized agent or the person who entered into the contract with the contractor." (*Id.*) (Emphasis added).

In the final bill that was enacted into law, however, the legislature changed the language in the new prelien notice section from "served personally" to "delivered personally." (App. 139) The legislature left unchanged the language of Minn. Stat. §

514.08, subd. 1(2), which required that the mechanic's lien statement to be "served personally" on the property owner.

The legislative history firmly illustrates the legislature's intent to distinguish between "delivered personally" and "served personally," and that it did not consider the phrases interchangeable. If they were interchangeable, there would have been no need to change the language. Although it is unclear from the legislative history why the change was made, it is reasonable to conclude that the legislature did not want to burden contractors and subcontractors with the necessity of affecting formal service of prelien notice at the time when they first start work on a project. But whatever the reason for the change, the fact remains that the legislature saw fit to change the proposed draft language from "delivered personally" and "served personally." This change was obviously important to the legislature and meant something. The district court's decision ignores the legislature's intent and renders the legislature's distinction between the two phrases meaningless.

B. RULE 4.02 OF THE MINNESOTA RULES OF CIVIL PROCEDURE APPLIES TO AND GOVERNS THE PERSONAL SERVICE OF A MECHANIC'S LIEN STATEMENT ON THE PROPERTY OWNER UNDER MINN. STAT. § 514.08.

Not long ago, the Minnesota Supreme Court addressed the requirements for personal service under the mechanic's lien statute in *Ryan Contracting, Inc. v. JAG Investments*, 634 N.W.2d 176, 186 (Minn. 2001). In *Ryan*, a mechanic's lien claimant filed a summons and complaint that initiated a foreclosure action, and served the general contractor but not the property owner within one year of claimant's last date of work. 634 N.W.2d at 179. In response, a subcontractor filed an answer in which it asserted a

crossclaim seeking to foreclose its mechanic's lien against the subject property. *Id.* at 186. The subcontractor, however, did not personally serve the property owner (a corporation) with its answer and crossclaim, but instead, mailed it to the property owner's attorney in accordance with Rule 5.02 of the Minnesota Rules of Civil Procedure. *Id.* The supreme court rejected the subcontractor's argument that it was required to comply with the personal service requirements of Rule 4.03, which governs service on a corporation.

In reaching its decision, the supreme court noted that the rules of civil procedure apply to mechanic's lien actions unless the mechanic's liens statutes are inconsistent or in conflict with the rules of civil procedure. *Id.* (citing Minn. R. Civ. P. 81.01 (a) & App. A). It concluded that because Minn. Stat. § 514.11 does not specify how a summons should be served in order to commence a mechanic's lien action, the Minnesota Rules of Civil Procedure, specifically Rule 4.03, apply and govern service in a mechanic's lien action. *Id.* The court stressed the importance of formal service under the mechanic's lien statute, stating "we have not treated service of process as a mere technicality . . . and have always required parties to adhere strictly to the service requirements." *Id.* at 188 (quotations and citations omitted). It further cautioned that "[s]ervice rules should be clear; parties should not be left to guess what, under different factual scenarios, will be an acceptable method of service. Requiring strict compliance achieves this result." *Id.*

Ultimately, the court in *Ryan* concluded that because the general contractor failed to properly serve the property owner personally in the initial mechanic's lien action, the property owner was not a party to the lien action; therefore, the subcontractor could not

rely on Rule 5.03 to serve its crossclaim on the property owner, but instead, had to personally serve the property owner pursuant to Rule 4.03. *Id.*

The decision in *Ryan* establishes that the requirements for personal service under Rule 4 of the Minnesota Rules of Civil Procedure apply to and determine the manner in which personal service must accomplished under those provisions of Minnesota's mechanic's lien statute that require such service. Rule 4.02 specifically addresses who may accomplish service, and succinctly provides that, "[u]nless otherwise ordered by the court, the sheriff or any other person not less than 18 years of age and not a party to the action, may make service of the summons or other process." Thus, personal service under Minn. Stat. § 514.08 may be accomplished only by a person who is at least 18 years old and not a party to the mechanic's lien action.

Here, the district court rejected this argument based on the mistaken belief that there is a conflict or inconsistency between Minn. Stat. § 514.08 and Rule 4.02 because a mechanic's lien statement does not constitute a "summons" or "other process" within the meaning of Rule 4.02. The district court was in error - there is no inconsistency or conflict between Minn. Stat. § 514.08 and Rule 4.02 concerning the issue of who may administer personal service because the statute is silent on this issue. The fact that Rule 4.02 references "summons" and "other process" is of no consequence and does nothing to preclude application of the rule to the mechanic's lien statute. Whether the personal service is of a summons or other process, or of a statutorily required notice such as the mechanic's lien statement under Minn. Stat. § 514.08, has no bearing on who may affect the service or the manner in which it must be accomplished. Because there is no actual

inconsistency or conflict between Minn. Stat. § 514.08 and Rule 4.02 concerning the issue of who may administer service, the requirements of Rule 4.02 apply and govern who may accomplish personal service under Minn. Stat. § 514.08.

The language of the mechanic's lien statute when read in its entirety and considered in light of the legislative history of Minn. Stat. § 514.011 and Minn. Stat. § 514.08, along with the supreme court's decision in *Ryan*, establish that the legislature intended to distinguish between service and delivery, and that the rules of civil procedure apply to and govern the requirements of personal service under the mechanic's lien statute. Therefore, applying the Rule 4.02 to the personal service requirement set forth in Minn. Stat. § 514.08, subd. 1, personal service of the mechanic's lien statement on the property owner under Minn. Stat. § 514.08 is effective only if it is made by someone who is at least 18 years of age and not a party to the mechanic's lien proceeding. Rule 4.02 precludes the lien claimant from administering personal service of the mechanic's lien statement on the property owner.

In this case, Hunter could not administer personal service of respondents' mechanic's lien statements under Minn. Stat. § 514.08, subd. 1(2) because he was an employee of Hunter Construction and the owner of Midwest, both of whom were asserting mechanic's liens against the Property and who were parties to the mechanic's lien foreclosure action. It also for this reason that he could not affect personal service of Verde's mechanic's lien statement.

C. PUBLIC POLICY FAVORS PERSONAL SERVICE BY A NONPARTY IN ACCORDANCE WITH RULE 4.02 RATHER THAN SIMPLE DELIVERY OF THE MECHANIC'S LIEN STATEMENT ON THE PROPERTY OWNER.

Public policy counsels that personal service under Minn. Stat. § 514.08 comply with the requirement under Rule 4.02 that service be made by a nonparty. The application of Rule 4.02 will provide clarity, certainty, and most importantly, it will protect both property owners and mechanic's lien claimants.

The purpose of Minn. R. Civ. P. 4.02 is "to eliminate bias, acrimony and possible oppression which is inherent in litigation." *Year 2001 Budget Appeal of Landgren v. Pipestone County Bd. of Com'rs*, 633 N.W.2d 875, 878 (Minn. App. 2001) citing *Lewis v. Contracting Northwest, Inc.,* 413 N.W.2d 154, 155 (Minn.App.1987) (affirming dismissal when pro se party personally served opposing party); *see also Stransky v. Indep. Sch. Dist. No. 761,* 439 N.W.2d 408 (Minn. App. 1989). In considering Rule 4.02, two distinguished legal commentators observe that the purpose of the rule "is to eliminate bias and acrimony and to reduce the chance a defendant can legitimately claim a defendant was not served. An impartial person is more likely to achieve and less likely to fail at obtaining service." 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 4:5 (4th Ed. 2010).

The requirements of Rule 4.02 are not onerous and will not unduly burden or prejudice lien claimants seeking to perfect and foreclose on their mechanic's liens. The rule simply requires that the person administering personal service be at least 18 years old and not a party to the action. The rule provides clarity and certainty, and succinctly

resolves the issue of who may administer personal service of the mechanic's liens statement under Minn. Stat. § 514.08, subd. 1(2).

The application of Rule 4.02 will also protect both property owners and lien claimants equally. Having an impartial, nonparty administer personal service under Minn. Stat. § 514.08 will reduce, if not eliminate, the occasion for bias and potential abuse or fraud. The rule protects lien claimants by reducing or eliminating the chance that a property owner will claim that he was never served with a copy of the mechanic's lien statement within the 120-day period required under Minn. Stat. § 514.08, subd. 1(2), thus preserving the lien claimant's right to foreclose on the lien and receive payment for the contributions it furnished to the property. Conversely, it will protect property owners from unscrupulous contractors who, in an effort to avoid the extinguishing of their lien, may fraudulently claim that they personally served the lien statement within the 120-day time period.

Because the clarity, certainty, and objectivity that Rule 4.02 brings to the personal service requirement under Minn. Stat. § 514.08 far outweighs any burden it may place on a lien claimant, public policy considerations strongly favors a rule establishing that Rule 4.02 applies to and governs who may administer personal service of the mechanic's lien statement on the property owner as required under Minn. Stat. § 514.08, subd. 1(2).

CONCLUSION

The district court erred in its interpretation and application of Minn. Stat. § 514.08 and its interplay with Rule 4.02 of the Minnesota Rules of Civil Procedure. The language of Minnesota's mechanic's lien statute and its legislative history, along with the Minnesota Supreme Court's decision in *Ryan Contracting, Inc. v. JAG Investments*, 634 N.W.2d 176 (Minn. 2001), establish that the rules of civil procedure, including Rule 4.02, apply to and govern personal service under the mechanic's lien statute, including Minn. Stat. § 514.08, subd. 1(2). Rule 4.02 precludes a party from administering personal service. It is undisputed that respondents did not have their mechanic's lien statements personally served by a nonparty.

Because respondents failed to properly serve their respective mechanic's lien statements within 120 days of their last item of work as required by Minn. Stat. § 514.08, subd. 1(2), their liens ceased to exist and deprived the district court of jurisdiction to consider their lien claims. Appellant Brickwell Community Bank, therefore, respectfully

requests that this court reverse the decision of the district court, and rule that respondents' mechanic's liens are invalid and unenforceable.

Respectfully submitted,

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Dated: 11/17, 2010

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 5,709 words. This brief was prepared using Microsoft Word 2007.

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